



April 29, 2011

Baryohay Davidoff  
California Department of Water Resources  
1416 9th Street  
Sacramento, CA 95814

Re: Supplemental Comments to Draft Language of California Code of Regulations, title 23, section 597.3 (Agricultural Water Measurement)

Dear Mr. Davidoff:

Pursuant to the April 25, 2011, email notice and invitation from Ms. Andria Avila of DWR, this letter follows our original comment letter dated March 23, 2011, and addresses revisions that have been proposed since then to California Code of Regulations, title 23, section 597, *et seq.* As with our letter of March 23, this letter is submitted jointly by the Friant Water Authority ("FWA") and the San Luis & Delta-Mendota Water Authority ("SL&DMWA"), both of which are members of the members of the Agricultural Stakeholder Committee.

FWA and SL&DMWA continue to have a ***fundamental disagreement*** with recent changes in the draft language of California Code of Regulations, title 23, section 597.3 (hereinafter "CCR 597.3"). Subdivision (c) of that section, that continues to interpret the underlying statutes in a manner contrary to the express intent of the Legislature.

As most recently revised, the language that troubles our agency now reads as follows:

"Option Available to Agricultural Water Suppliers Subject to either the Central Valley Project Improvement Act (CVPIA) (Public Law 102-575) or the Reclamation Reform Act (RRA) of 1982, or both: [a]n agricultural water supplier subject to CVPIA or RRA shall be deemed in compliance with this article if all irrigation water delivered by that water supplier to each customer is delivered through measurement devices that meet the United States Bureau of Reclamation accuracy standards defined in Reclamation's Conservation and Efficiency Criteria Standards of 2008 or future amendments ***that meet the criteria of options §597.3(a) or §597.3(b) of this Article.***" (Draft Cal. Code of

Regs., tit. 23, § 597.3, subd. (c) [as amended on Friday, April 22, 2011]] (emphasis added.)

Section 597.1, subdivision (h), of the previous version of the draft language of California Code of Regulations, title 23, section 597, *et seq.*, (hereinafter “CCR 597.1(h)”) contained similar language relating to the edition of the Bureau of Reclamation’s (“USBR”) Conservation and Efficiency Criteria Standards (“CECS”) to be referenced by an agricultural water supplier (“AWS”).<sup>1</sup> It appears that the provisions previously set forth in CCR 597.1(h) have been amended slightly and rebranded as CCR 597.3, subdivision (c). We would like to reassert our comments from our previous comment letter, dated March 23, 2011, against the inclusion of language relating to any particular edition of the CECS. Moreover, the amendments made by DWR to the provisions previously located at CCR 597.1(h) raise additional concerns, which are addressed at length below. We further believe these recent changes in the draft language continue to be in direct contravention of the purposes of Senate Bill No. 7X-7 (“SBX7-7”). Indeed, application of the regulation, as it now reads, would promote an environment of non-compliance with both the Central Valley Project Improvement Act (“CVPIA”) or Reclamation Reform Act of 1982 (“RRA”) and the relevant sections of the California Water Code.

In order to best present our analysis, the comments below are organized into three categories. First, this comment letter will address the new draft regulations in relation to Water Code sections 10608.48 and 10828. Second, this comment letter will address the new draft regulations in relation to the previous draft regulations dated Friday, March 11, 2011. Finally, this comment letter will address the new draft regulations in relation to USBR's CECS.

First, a fundamental discrepancy still exists between the new draft regulations and sections 10608.48 and 10828 of the Water Code. As stated in our previous comment letter, SBX7-7 reauthorized the Agricultural Water Management Planning Program through the reimplementation of Water Code section 10608.48, subdivisions (d), (e) and (f), and section 10828. Section 10828 provides that an Agricultural Water Supplier (“AWS”) that submits a water conservation plan to USBR pursuant to the CVPIA or RRA may submit that plan in place of the plan required under the Water Code. CCR 597.3, subdivision (c), as it is now drafted, provides that an AWS submitting a water conservation plan to USBR pursuant to CVPIA or RRA may submit that same plan in satisfaction of the regulations so long as the plan conforms with USBR's 2008 edition of its CECS, or with future amendments meeting the provisions of CCR 597.3, subdivisions (a) and (b). We believe this draft regulation is a product of flawed reasoning. In drafting and re-implementing Water Code sections 10608.48 and 10828, the Legislature purposefully deferred to the most current version of USBR's CECS because, unlike the CECS, it is far more difficult to update the code to reflect changes in conditions and technology. Similarly, unlike the CECS, the draft regulations cannot be easily or efficiently updated to reflect changes in conditions and technology once the regulations have been adopted.

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<sup>1</sup> The previous draft language to CCR 597.1(h) provides:

“Agricultural water suppliers that are subject to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, shall be deemed in compliance with this article, if all irrigation water delivered by those supplier is delivered through devices that meet the United States Bureau of Reclamation accuracy standards outlined in the 2008 Conservation and Efficiency Criteria Standards.”

In relation to the previous draft language of CCR 597.1(h), the current language of CCR 597.3, subdivision (c), appears at first glance to be an improvement. CCR 597.3, subdivision (c), to a certain degree, will allow an AWS to submit plans conforming to USBR's future revisions to the CECS. However, closer inspection of the draft language discloses several significant flaws. While the current provisions of CCR 597.3, subdivision (c), do specify that plans submitted conforming to USBR's 2008 CECS and "future amendments" of the same will satisfy its agricultural water measurement requirements, the regulation goes on to state that the 2008 CECS or "future amendments" must meet the criteria set forth in CCR 597.3, subdivisions (a) and (b). The way we interpret this section is as follows: An AWS that is required to submit a water management plan pursuant to CVPIA or RRA may submit that plan in satisfaction of DWR's regulation so long as the plan meets the criteria set forth in CCR 597.3, subdivisions (a) and (b). CCR 597.3, subdivisions (a) and (b) include specific measurement accuracy standards and provisions concerning measurement device locations. In comparing the previous draft language of CCR 597.1(h) and the current language of CCR 597.3, it is clear that DWR has effectively replaced its reliance on USBR's 2008 CECS with reliance solely on DWR's own criteria set forth in CCR 597.3, subdivisions (a) and (b). However, depending upon future revisions of the CECS, there may be discrepancies between the technical provisions of 597.3, subdivisions (a) and (b), and the technical provisions of the CECS dealing with the exact same subject matter. The stasis in the regulation we addressed and were hoping to avoid in our previous comment letter still remains and indeed may be exacerbated by the revisions to the previous language of CCR 597.1(h).

Additionally, as mentioned in our previous comment letter, and as we continue to reiterate in this comment letter, Water Code section 10828, subdivision (b), states that any AWS that must submit a water conservation plan to USBR pursuant to either CVPIA or RRA need not comply with the scheduling requirements under the Water Code, but should instead comply with the scheduling requirements in the CECS. Under the CECS scheduling requirements, a "contractor" must submit a revised water conservation plan every five years. (See Section 8 of the 2008 CECS.) The CECS further provides that a "contractor" must use the **most recently adopted** CECS when submitting a new or revised water conservation plan. Under the plain language of section 10828, in conjunction with the criteria set forth in the CECS scheduling requirement, an AWS submitting a water conservation plan is required to use the most recently adopted CECS. An AWS attempting to satisfy both USBR's CECS requirements and DWR requirements under the current draft language of CCR 597.1(h) will be unable to do so, because DWR requirements, referencing only the 2008 CECS and CCR 597.3, will in the future likely be different than the USBR CECS requirements, which change based on federally-required updates and modifications to the CECS. This is a fundamental flaw in the draft language of CCR 597.3, subdivision (c), which our member agencies find highly objectionable. DWR has failed to address this concern in any manner with its revision of CCR 597.3.

Finally, an examination of section 597.3, subdivisions (a) and (b), and USBR's 2008 CECS, reveals that an AWS conforming to the 2008 CECS measurement standards may still be in violation of DWR's regulations. Section 3.A. of the 2008 CECS requires that, for the most part, an AWS must measure flow with devices maintaining a +/- 6 percent accuracy range. However, CCR 597.3, subdivision (a), relating to future measurement devices at the location of transfer to a customer delivery point, provides that measurement device accuracy must be +/- 5 percent when the device is lab certified and +/- 10 percent when the device is non-lab certified. We find this conflict between the provisions of CCR 597.3, subdivision (a), and the CECS to be

untenable. The effect of this language would mean that a AWS currently using a measurement device that is lab certified for an accuracy of +/- 6 percent would not be in conformity with DWR's regulation. Of further note is CCR 597.3, subdivision (b), relating to future measurement devices at the upstream locations of the delivery points to multiple customers, which provides that measurement device accuracy must be +/- 3 percent when the device is lab certified and +/- 6 percent when the device is non-lab certified. Again, an AWS currently using a measurement device that is lab certified for the federally mandated minimum accuracy of +/- 6 percent would be in violation of DWR's regulation. Both of the above listed situations are objectionable and are not congruent with DWR's stated intent to reach a mutually acceptable agreement with the members of the Agricultural Stakeholder's Committee.

In summary, the fundamental flaw is this: As we pointed out in our earlier letter, the CECS is subject to revision either by the mandatory three year review required under Section 3405, subdivision (e), of CVPIA, or possible future Congressional amendment of CVPIA or RRA. In other words, as circumstances mandate, the CECS will change as it adapts to future circumstances. As the CECS changes, each AWS that is subject to CECS compliance will find itself in one of two impossible situations. It will either submit a water conservation plan that complies with DWR regulations, and face USBR's refusal to accept its plan for failure to comply with the CECS then in effect, or it will submit a plan that complies with the CECS then in effect, and face DWR's disapproval because the plan does not comply with its regulations. This "lose-lose" situation is certainly not what the Legislature intended to result from SBX7-7 when it expressly recognized compliance with the CECS to be an appropriate and effective way for Agricultural Water Suppliers to reach California's goals for the conservation of our state's agricultural water resources.

As a solution, we respectfully suggest DWR remove subdivision (c) of CCR 597.3 in its entirety, as that section merely confuses what is already clearly addressed in Water Code section 10828, or, alternatively, revise the draft language to mirror the requirements under section 10828 of the Water Code.

Thank you for your time and consideration and we look forward to your response to this comment.

Sincerely,



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for FRIANT WATER AUTHORITY



**Daniel G. Nelson**  
Executive Director  
for SAN LUIS & DELTA-MENDOTA WATER  
AUTHORITY

cc: Mark Cowin, Director, Department of Water Resources  
Donald R. Glaser, Regional Director, Mid Pacific Region, United States Bureau of  
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